



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Dane Cty. Dept. of Human Services on behalf of Columbia County, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 175095

Pursuant to petition filed June 22, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Dane Cty. Dept. of Human Services on behalf of Columbia County to disqualify ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Thursday, August 4, 2016 at 09:45:00 AM at via telephone.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Dane Cty. Dept. of Human Services on behalf of Columbia County
1819 Aberg Avenue
Suite D
Madison, WI 53704-6343

Respondent:

██████████
██████████
██████████

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ADMINISTRATIVE LAW JUDGE:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # ██████████) received FoodShare benefits in Columbia County, Wisconsin at all times relevant here.
2. Petitioner prepared an Administrative Disqualification Hearing Notice, dated July 1, 2016, alleging that Respondent had failed to report unearned income from taxable interest, rent and royalties on multiple six month report forms (SMRF) and multiple reviews as well as failing to report self employment for another household member (Respondent's spouse) on an October 2012 SMRF or a January 6, 2014 review.

Though not the subject of this hearing, the failure to report is alleged to have created a \$40,904.00 FoodShare overpayment.

3. Respondent completed SMRFs on 1/5/09, 2/3/11 and 10/10/12 without reporting unearned income form taxable interest, rent and royalties for herself. (There are other SMRFs where the same allegation is made but they are not in the record so not noted here as a finding.)
4. Respondent completed an April 4, 2012 online FoodShare application and does not report her unearned income or her husband's self employment.
5. Respondent completed interviews for FoodShare on 7/28/09, 7/29/10, 8/30/11, 2/6/12 and 1/6/14 without reporting her unearned income or her husband's self employment.
6. Respondent did receive unearned income from a family trust through the time involved here. Her husband did have a tree care business and a trucking business per 2012 tax returns.
7. Respondent failed to appear for the scheduled August 4, 2016 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether this respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook (FSH), § 3.14.1; see also 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory,

and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

Also relevant here is the fact that income is key to determining FoodShare eligibility and allotment levels. See, generally, *FSH*, § 4.1.1.

I am sustaining the IPV alleged here. There are a significant number of tax documents in the record here as well as the SMRFs noted above and it is apparent that Respondent was not reporting income as required and this failure was over a period of years and on forms and well as in interviews. This pattern of making false or misleading statements and misrepresenting, concealing and withholding facts caused FoodShare to be issued in excess of what Respondent was eligible for. This is clear and convincing evidence that Respondent intentionally violated FoodShare program rules. As this violation was the first such violation committed by Respondent, Petitioner correctly seeks to disqualify Respondent from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. That Respondent violated, and intended to violate, the FS program rules specifying that a person may not conceal or withhold information.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by Respondent.

NOW, THEREFORE, it is

ORDERED

That Petitioner’s determination is sustained, and that Petitioner may make a finding that Respondent committed a first IPV of the FoodShare program and disqualify Respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

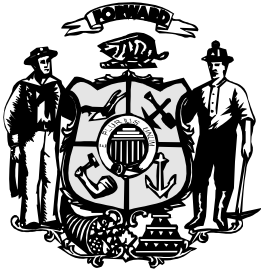
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 9th day of September, 2016

\sDavid D. Fleming
Administrative Law Judge
Division of Hearings and Appeals

c: Capital Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
[REDACTED] - email



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The preceding decision was sent to the following parties on September 9, 2016.

Dane Cty. Dept. of Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]@countyofdane.com